No. 2894.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Appellant,
vs.
Grand Canyon Cattle Company,
a Corporation,
Respondent.

ANSWER TO REPLY BRIEF OF APPELLANT.

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Counsel for appellant has filed what he terms a "Reply Brief," and we are availing ourselves of the right given on the oral argument to file an answer.

Counsel states that we have adroitly shifted our position from time to time until we have reached the point where the burden of proving notice is shifted upon the Government. We except to the statement of

counsel that we have shifted our position at any time or in any respect. On the contrary the position we have taken has been consistently maintained throughout the entire course of this litigation.

Counsel's unwarranted criticism evidently resulted from a misunderstanding of the law applicable to the question of burden of proof in cases of this kind. While it may be admitted for the purposes of the argument, that the burden of proving the defense of *bona fide* purchaser rests upon the defendant, yet, as we have always contended, that burden is sustained when the defendant shows the payment of a valuable consideration. This *prima facie* at least constitutes proof that the defendant was a *bona fide* purchaser. Upon such proof being made, the presumption arises that the purchase was made in good faith and without notice. This presumption is based upon the fact that it is extremely unlikely that a vendee would purchase and pay a valuable consideration for property if he had knowledge of a latent equity existing in a third person, and that bad faith will not, in such circumstances, be presumed. The presumption of good faith, thus indulged by the law, imposes the burden of proving notice upon the party claiming the equity.

We have already called the court's attention to a number of authorities which fully supports this doctrine, and there is absolutely nothing in the Wright-Blodget case, so much relied upon by counsel, which is at all at variance with the rule, and counsel have cited no case holding to the contrary.

In addition to the cases already cited by us upon

this proposition, we beg leave to call attention to the following:

Williams v. Smith, 128 Ga. 306, 57 S. E. 801;
Johnson v. Neal, 67 Ga. 528;
Block etc. Co. v. Holcomb etc. Co., 75 N. W. 499 (Iowa);
Daly v. Rizzuto, 109 Pac. 276 (Wash.);
Atkinson v. Greaves *et al.*, 11 So. 688 (Miss.);
Morris v. Daniels, 35 Ohio St. 417;
Lamar's Extr's v. Hale, 79 Va. 147;
Kruse v. Conklin, 108 Pac. 856 (Kas.);
Hull v. Diehl *et al.*, 52 Pac. 782 (Mont.);
See note to Sec. 759, Vol. 2, Pomeroy's Eq. Jurisprudence, p. 1356, third edition.

Counsel calls attention to the fact that the case of United States v. Cowart, 205 Federal 316, cited by us in our former brief, was overruled by the court in United States v. Brannan, 217 Federal 849. This statement is correct, and it is also true that we inadvertently overlooked the fact in our brief. An examination, however, of the opinion delivered by the Circuit Court of Appeals will show that the point upon which the decision turned, was that there was *no proof* of the *payment of a valuable consideration* otherwise than by a mere recital in the deed; and the court held that according to the weight of authority this recital was not sufficient; and right here we would suggest that the inference might well be drawn that if the proof of payment of a valuable consideration had been made in a satisfactory manner, the ruling

would have been otherwise, and the judgment of the lower court sustained.

The court in its opinion in that case says:

> "To be entitled to protection as a *bona fide* purchaser, he must have bought in good faith and paid value. United States v. Des Moines etc. Co., 142 U. S. 510, 530, 12 Sup. Ct. 308, 35 L. Ed. 1099. The burden was upon him to make satisfactory proof of *purchase and payment*. The recital in the deed to him did not constitute such proof * * * There was *no evidence* that either the patentee's deed to Wilson or Wilson's deed to Brannan was supported by any valuable consideration. The result of the absence of *such evidence* was that the affirmative defense pleaded was wholly unsupported. The evidence adduced having clearly made out the case stated in the bill, and no defense set up having been supported by evidence, the plaintiff was entitled to a decree canceling the patent and vacating the subsequent conveyances of the land embraced in it."

There is certainly nothing in the decision of the case which is at all out of harmony with our contention, or the decisions which we have cited in support thereof, that when proof of the payment of a valuable consideration is made, the law raises the presumption that the purchase was without notice of any equity, and the burden of showing to the contrary rests upon the party claiming such equity.

We think it may also be fairly inferred from the opinions in the case of the United States v. Clark, in the Circuit Court of Appeals (138 Federal 294) and the Supreme Court of the United States (200 U. S.

601), that proof of payment of a valuable consideration is sufficient to establish, *prima facie* at least, the defense of *bona fide* purchaser, and that this *prima facie* showing casts the burden of proving notice upon the other party.

Counsel, on page eight of his reply brief, says that the cases which we cited to the effect that notice must be proven by clear and convincing evidence, do not so hold; that they decide merely that the original fraud in procuring of the patent must be proven by such character of evidence. This is utterly at variance with the fact, as an examination of the cases cited will clearly demonstrate.

On page nine of his brief counsel says that he has never asserted that Mr. Marshall or the Cattle Company was not acting in good faith. It may be true that such assertion was not made in so many words, but when counsel says, as he does in his opening brief (page 12), that Mr. Marshall must have been "blind indeed not to see that the patents had been improperly obtained from the Government." It is almost equivalent to asserting that the purchase was made by Mr. Marshall with knowledge of Saunders' alleged fraud, and therefore in bad faith; a claim which finds no support in the record and is in fact utterly unfounded.

For the first time in this case it is now claimed that Dimmick had knowledge of Saunders' fraud, and that by reason of his employment by the Grand Canyon

Cattle Company in December, 1907, *after the purchase had been consummated, and after the deeds had passed and the money had been paid,* the Cattle Company is to be charged with knowledge of everything that Dimmick had learned while employed by Saunders. As above stated, this point is made for the first time in this reply brief; it would seem to be very much of an afterthought and not regarded by counsel as of much importance.

In answer to the point, however, we would call the court's attention first to the fact, as admitted by counsel, that Dimmick did not enter the employ of the Cattle Company until after the deal had been closed in Salt Lake on the 5th day of December. This is in strict accordance with Mr. Marshall's testimony [Record 317-318.]

Counsel calls attention to testimony of Mr. Dimmick to the effect that he thought his employment might have begun earlier than this, but we submit that, considering all the other testimony in the case, it is highly probable that Mr. Marshall's version is correct; but if there is any conflict, this court, under the law, would hold that the lower court accepted Mr. Marshall's statement as true. As supporting Mr. Marshall, however, we call the court's attention to the fact that to the last moment before the deal was closed Dimmick was representing Saunders.

Mr. Marshall testified:

"There were Mr. Dimmick, Mr. Clark and Mr. Saunders representing Mr. Saunders' interests, and Mr. Stevenson and myself representing my interests

and it was, as a final result of that conversation that the ten thousand head were agreed upon."

This statement is made with respect to negotiations which were carried on as to the number of cattle to be paid for, and which negotiations proceeded well into the night of the day when the transaction was closed.

As a legal proposition, any knowledge that Dimmick may have had while he was the agent of Saunders should not, under the circumstances disclosed by this record, be imputed either to Mr. Marshall or the Grand Canyon Cattle Company. The evidence shows that Dimmick was merely a cattle foreman, with no power whatever to engage in any financial transactions. Mr. Marshall testified [Record page 317]:

"His duties were to be that of superintendent of the cow ranch, looking after the cattle and the water and the range conditions. He was to have no power to purchase anything or sell anything at that time other than supplies for the ranch * * * Mr. Dimmick, while he was in my employ, never did anything for the Grand Canyon Cattle Company other than to look out for the cattle and the grazing and the water, and make such improvements as he was authorized to make, after first being passed upon by the board of directors of the Grand Canyon Cattle Company."

There is no contradiction of this testimony, and it thus clearly appears that the matter of notice as to the condition of the title to these lands was something entirely outside of the scope of Mr. Dimmick's employment, and hence no knowledge which he had

gained in respect thereof could legally be imputed to the Grand Canyon Cattle Company after he became its employee.

It is also a well established principle, that knowledge gained by an employee before his employment is not to be imputed to his employer, unless, among other things, it is *clearly* made to appear that this knowledge was in the mind of the agent at the time of his employment and at the time of the transaction with his principal.

It is also true that where the circumstances are such that an agent would not be likely to divulge knowledge possessed by him, such knowledge will not be imputed to the principal.

Goerz v. Barstow, 148 Federal 569;
Bank of Oberton v. Thompson, 118 Federal 798;
Brown v. Cranberry etc. Co., 72 Federal 101;
Wittenbrock v. Parker, 102 Cal. 103.

If there was fraud in the procurement of patents on the part of Saunders, and Dimmick was a party thereto, as claimed by counsel, it would hardly be presumed that at the time he was employed by the Grand Canyon Cattle Company he would have imparted all knowledge of such fraud, possessed by him, to his new employer. Furthermore, Dimmick's position with his former employer was more or less confidential, and this is another reason why it would not be presumed that he would betray his former employer by telling of his fraudulent acts to a subsequent employer.

It is also claimed that the Grand Canyon Cattle Company is charged with notice of whatever knowledge Mr. Stevenson possessed. It does not appear that Stevenson knew anything more than Mr. Marshall, except as to an alleged conversation between Stevenson and the witness Harris, which the court declined to admit. No claim of error was made in the original brief, nor indeed do we understand that counsel now claim in this reply brief that there was error in the court's ruling in this particular. Of course, if the ruling was right, the testimony taken under equity rule 46 cannot be considered. But in any event we say that the court was right in its ruling in excluding this testimony of statements made to Stevenson; for the reason that any such statement made to him would not bind his employer. Stevenson was merely a cattle foreman or superintendent, and had no authority whatever concerning the purchase of this property.

Mr. Marshall testified as to Stevenson's employment:

"Mr. Stevenson appeared at the V. T. ranch in October, 1907, *to count the cattle*. Mr. Stevenson was with me on the second trip which I made to the Buckskin Mountain Range in 1907, early in September." [Record p. 327.]

"He was there for the purpose of arranging or constructing the corrals and seeing that shoots were built in order to make the count later in the year in compliance with the July 30th contract." [Record p. 327.]

The following questions were put to Mr. Marshall:

"Q. Is it true that Mr. Stevenson in all of these negotiation with Mr. Saunders was representing you as your manager?"

To which he answered, under rule 46, "He was not." [Record p. 323.]

And on page 324 he testified:

"If he found such a place (that is a good cattle range) he was not authorized to enter into any negotiations."

In other words the testimony of Mr. Marshall shows beyond any question that Mr. Stevenson was simply acting for him as a cattle or stock foreman or superintendent, and there is not a bit of testimony to show that he had any authority whatever to enter into any negotiations or do anything in any financial transaction involving the purchase of any range property. It should, of course, be borne in mind that the burden was on the Government to first prove that Stevenson was the agent of Marshall, and the scope of the agency, before any conversation with Harris would be admissible. This the Government wholly failed to do. But in any event the statement alleged to have been made by the witness Harris to Stevenson is of no moment whatever.

The record shows that Harris said to Stevenson while they were branding the cattle in October, 1907:

"I was frank to inform Mr. Stevenson that *certain* claims known as the 'Kane Lode,' 'Kane Millsite,' and the 'Jacobs Lode' were being held by the Government as being invalid, and that it was very doubtful in my opinion if patent on the same *would ever be issued*,

because reports of all forest supervisors showed these claims to have been located to obtain water sources and not for mining purposes, and further than that these claims were not upon mineral bearing rock in place."

In the first place the only claim referred to by the witness Harris, involved in this suit, was the "Jacobs Lode." The witness' statement was that it was doubtful if patents "would be issued." The fact was that a patent had already and long since been issued upon the only claim referred to by the witness which is in controversy in this suit. It is difficult to conceive, therefore, how the casual statement made by Harris to Stevenson that the patent would not issue on the claim, where it had already been issued, would impart notice to the Grand Canyon Cattle Company of anything whatsoever.

In this connection we again call to the court's attention the rule laid down by so many of the cases that mere suspicion, however strong, is not equivalent to notice.

It is stated that the Grand Canyon Cattle Company would be charged with all the knowledge that Marshall possessed, granting this for the purpose of the argument. We say first that Mr. Marshall is not shown to have had any knowledge other than what he would gain from the mere physical aspect of the claims, and this was certainly insufficient to impart notice of the alleged fraud of Saunders.

This conversation between Stevenson and Harris took place long after the contract of July 30th was

made, at which time Mr. Marshall paid $15,000.00 in cash.

It is our contention that on July 30th, when this contract was made, and $15,000.00 was paid, Mr. Marshall then acquired an equity equal to that of the Government, if not superior, and that all of this equity was transferred to the Grand Canyon Cattle Company. We further contend that having acquired at least an equal equity as early as July 30th, 1907, the Grand Canyon Cattle Company had a right to buttress this equity with the legal title, and that having done so it occupies a superior position in this suit to that of the Government. That a legal title thus acquired will overcome an equity is well established, even though such legal title be acquired with knowledge of the equity. See:

Duber Watch Case Mf'g Co. v. Dougherty, 62 Ohio State 589, 596, 57 N. E. 455.

This case is cited and noted with approval in the leading case of United States v. Detroit etc. Co., 131 Federal 678, 679. See also the same case on appeal to United States Supreme Court, 200 U. S. 321. We might cite many other authorities to the same effect, but we deem it unnecessary so to do.

Respectfully submitted,

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Henry J. Stevens,

Solicitors for Respondent.